There was, therefore, in the present case no finding before the Court on which the Subordinate Judge could base his order for [597] the restoration of the purchase-money, and a proper case has, therefore, we think, been made out for the intervention of the Court in the exercise of its extraordinary jurisdiction. We must, therefore, reverse the order of the Subordinate Judge and send back the case to be disposed of according to law. Costs to follow the result.

Order reversed.

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18 B. 597.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Fulton.

GHELA ICHHARAM (*Original Defendant*), *Appellant v.* SANKALCHAND JETHA (*Original Plaintiff*), *Respondent.** [26th September, 1893.]

Res judicata—*Issue in previous suit—Unnecessary issue—Finding on an unnecessary issue inserted in decree—Appeal—Civil Procedure Code (XIV of 1882), s. 13.*

The plaintiff attached certain property in execution of a decree obtained by him against one Jamna, the widow of one Raichand. The defendant Ghela intervened and claimed the house as having been purchased by him from one Samal Nathu, to whom, he alleged, Jamna had sold it before the date of the decree against her. The plaintiff's attachment was removed, and the plaintiff thereupon brought a suit (No. 670 of 1886) to establish his right to sell the house in execution. The Court found that the house was not Jamna's, and dismissed the suit on that ground, but it also recorded a finding that the sales set up by the defendant were fraudulent and collusive. Subsequently the plaintiff obtained a decree against Mulji, the son of Raichand, and in execution again attached the house. The defendant again intervened, alleging that the house was his, and the attachment was removed. Thereupon the plaintiff filed this suit to establish his right to sell in execution. The defendant again pleaded that he was owner of the house by reason of the sales set up by him in the former suit. It was argued that these sales had been proved to be collusive and fraudulent in an issue raised in that suit, and that the defence in the present suit was, therefore, *res judicata*.

Held, that the defence was not *res judicata*. The former suit had been decided on the finding that the property in question was not Jamna's. The finding in that suit on the issue as to the sales to the defendant was not necessary for the determination of the suit.

Where an issue is not necessary for the decision of the suit in which it is raised, the decree couched in general terms does not cover the finding on that issue, nor can the insertion of such finding in the decree give it the force of *res judicata*. The Civil Procedure Code does not contemplate findings on issues being inserted in it (see ss. 2 and 6 and sch. IV) and there is no section in the Code which makes it necessary to appeal from the decree, because such finding has been inserted in it.

[**Appl.**, 35 B. 38 (40)=12 Bom. L.R. 766=7 Ind. Cas. 967; **R.**, 17 A. 174 (178)=15 A.W.N. 47; 22 B. 245 (250); 32 B. 315=10 Bom. L. R. 380 (384); 9 C.W.N. 60 (65); 9 Ind. Cas. 1030=120 P.L.R. 1911=101 P.W.R. 1911; 92 P.R. 1902 (F.B.)=16 P.L.R. 1903; **Expl.**, 25 B. 115 (124).]

[598] THIS was a second appeal from the decision of Gilmour McCorkell, District Judge of Ahmedabad.

Suit to establish the right to sell a house in execution of a decree.

One Raichand died, leaving behind him a widow Jamna and a son Mulji. After his death the plaintiff brought a suit (No. 1181 of 1880)

* Second Appeal No. 266 of 1892.

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against Jamna alone as the representative of her deceased husband Raichand to recover a debt due by him. Mulji was not joined as a party to that suit. The suit was compromised, and a decree was passed in the terms of the compromise making Jamna personally liable for the debt. In execution of the decree the plaintiff attached a certain house as the property of Jamna. Thereupon the defendant Ghela Ichharam intervened, claiming the house as his, and praying for the removal of the attachment. He alleged that Jamna as the mother and guardian of Mulji had sold the house to one Samal by a registered deed dated the 11th December, 1879, and that he (the defendant) had purchased the house from Samal under a registered sale-deed dated the 8th August, 1882. The attachment was consequently removed.

The plaintiff then brought a suit (No. 670 of 1886) against the defendant to establish his right to sell the house as the property of Jamna. In that suit the defendant pleaded that he had been in possession of the house as owner, and that he had purchased it from Samal, to whom it had been sold by Jamna before the date of the decree. The suit was dismissed on the ground that Jamna had no interest in the house.

Other issues were, however, raised in the case with reference to the title set up by the defendant, and upon them the Court found that the sale-deeds to the defendant were fraudulent and without consideration.

Subsequently the plaintiff obtained a bond from Mulji in satisfaction of the decree against his mother Jamna, and brought a suit (No. 529 of 1890) upon it, and got a decree against Mulji. In execution of that decree the plaintiff again attached the house in dispute as the property of Mulji. That attachment was also removed on the defendant's application.

[599] The plaintiff then brought the present suit against the defendant to establish his right to sell the house in execution of his decree in suit No. 529 of 1890 against Mulji, alleging that the sales set up by the defendant were colourable and fraudulent transactions.

The First Class Subordinate Judge dismissed the suit, holding that the plaintiff's judgment-debtor Mulji had no saleable interest in the house at the time of the attachment; that the sales relied on by the defendant were not proved by the plaintiff to have been colourable and fraudulent, and that the plaintiff was not entitled to any relief. In his judgment the Subordinate Judge remarked that the finding of the Court in the previous suit (No. 670 of 1886), that the two sales were fraudulent and without consideration, was not necessary for the decision of the suit, and that the question was, therefore, not *res judicata*, and this finding could not prejudice the defendant who had succeeded in the present suit.

On appeal by the plaintiff the Judge held that the defence based upon the sale deeds set up by the defendant on which he rested his title, was *res judicata* by reason of the decision on the issues raised in suit No. 670 of 1886, and that the house was liable to be sold in execution of the plaintiff's decree. He, therefore, reversed the decree.

Defendant preferred a second appeal.

P. M. Mehta, with *Sitanath Gopinath Ajinkya*, for the appellant (defendant).—They cited *Thakur Magundeo* v. *Thakur Mahadeo Singh* (1); *Jamaitunnissa* v. *Lutfunnissa* (2).

Govardhanram M. Tripathi, for the respondent (plaintiff).—He cited *Krishna Behari Roy* v. *Brojeshwari Chowdranee* (3); *Niamut Khan* v. *Phadu*

(1) 18 C. 647. (2) 7 A. 606. (3) 2 I.A. 283.

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Buldia (1); *Anusuyabai* v. *Sakharam Pandurang* (2); *Jamaitunnissa* v. *Lutfunnissa* (3) (remarks of Mahmood, J.)

JUDGMENT.

SARGENT, C. J.—The question raised by this second appeal is whether the District Judge was right in holding that the issue [600] whether the sale by Bai Jamna to Samal Nathu through whom defendant claims was collusive and fraudulent, was *res judicata* by the finding on that issue in Suit No. 670 of 1886 between the same parties. In that suit the present plaintiff sought for a declaration that the house in dispute was the property of his judgment-debtor Bai Jamna, against whom he obtained a personal decree, alleging that the sale by Bai Jamna to Samal Nathu, on which defendant relied, was collusive or fraudulent. The Subordinate Judge held that Bai Jamna had no interest in the house, and dismissed the plaint on that ground; but he also recorded a finding that the above sale was collusive and fraudulent.

The question whether a finding on an issue which was not necessary for the decision of the case, and not embodied in the decree, can be regarded as *res judicata* in a subsequent suit between the same parties, turns upon the language of s. 13 of the Civil Procedure Code and was very fully discussed by the Allahabad High Court on a reference to a Full Bench in *Jamaitunnissa* v. *Lutfunnissa* (3), Petheram, C. J., delivering the judgment of himself and Straight and Brodhurst, JJ., says: (pp. 610-11) "The decree, though in general terms, will stand good as finally deciding the issues raised by the pleadings upon which the ultimate determination of the cause and the decree itself actually rested. More than these the decree cannot cover, and we are clearly of opinion that the findings in a judgment upon matters which subsequently turn out to be immaterial to the grounds upon which a suit is finally disposed of as to the plaintiff's right to any portion of the relief sought by him as declared by the decree, amount to no more than *obiter dicta* and do not constitute a final decision of the kind contemplated by s. 13 of the Code." The question had already been virtually decided in the same sense in *Anusuyabai* v. *Sakharam Pandurang* (2) where West, J., says: "A point is not finally decided against any party who is not allowed the opportunity of questioning the decision" and "no appeal lies against a merely incidental decision by one who is not prejudiced by the concluding decision to which the partial ones are but subsidiary," meaning by 'subsidiary' a decision not necessary to the determination of the suit.

[601] Mahmood, J., who differed from the majority of the Court in *Jamaitunnissa* v. *Lutfunnissa* (3) as to the final conclusion, admitted that some findings on issues would not be *res judicata*. He says: (p. 622) "It is of course possible that when more than one issue arises in a suit, the answer to one issue may furnish a full basis for the disposal of the *whole* suit either by decreeing or dismissing it. In such a case it is perfectly conceivable, that, if the Court went on to record findings upon other issues not essential to the justification of the decree, such findings might be mere *obiter dicta* not having the force of *res judicata*. From such *obiter dicta* no appeal could lie," but he held that such was not the case in the suit before the Court, as the plaintiff sought "not only possession of the property but also the cancellation of the *wakfnama*" on which the

(1) 6 C. 319. (2) 7 B. 464. (3) 7 A. 606.

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defendant relied, and the pleadings, therefore, as the learned Judge said, gave rise to two issues essential for the disposal of the suit.

The question, therefore, in this view turns upon the state of the pleadings. The case of *Krishna Behari Roy* v. *Brojeswari Chowdranee* (1) is a good illustration of this. There the plaintiff claiming to be the adopted son of the last owner sought to recover the land from the putnidars who had obtained leases from the widow, and the reversionary heirs intervened for the purpose of disputing the adoption. Both the Civil Courts of first instance and on appeals found in favour of the putnidars that the putnis could not be set aside, and dismissed the plaintiff's suit; but they also found against the intervener and in favour of the adoption, and the Privy Council held in the subsequent suit by the intervener to set aside the adoption that the issue as to the adoption was *res judicata* because it was a material issue which had been decided in the former suit. Their Lordships, as shown by the judgment, treated the suit before them as raising not only a question between the plaintiff and putnidars as to the validity of their putnis, but also a distinct question between the plaintiff and intervener as to validity of plaintiff's adoption. Again in *Radha Madhub Holdar* v. *Monohur Mukerji* (2), the Privy Council held that the question as to who [602] was the true representative of Matangini was the material issue in both suits, and, therefore, that the finding in the first suit operated as a bar to the second suit. Where, however, the defendant sets up two grounds of defence to the relief sought by the plaintiff and succeeds on one which causes the dismissal of the plaint, the decision on the other issue in the plaintiff's favour cannot be said to be material to the determination of the suit; it is, therefore, not *res judicata*, and no appeal would lie against it, because, as was remarked by the Privy Council in *Rajah Run Bahadoor Singh* v. *Mussumut Lachoo Koer* (3), "the decree was not based on it, but was made in spite of it." It must be admitted that it is impossible to reconcile the above view of the question with the decision of the Calcutta High Court in *Niamut Khan* v. *Phadu Buldia* (4) where it was laid down (p. 322) in the broadest terms that upon the proper construction of s. 13 of Act X of 1877, "when a material question," although immaterial for the purposes of the suit and although not embodied in the decree, "has been substantially tried and determined in a former suit, it cannot be tried again in any other suit between the same parties." That Full Bench ruling, however, has since the decision of the Privy Council in *Run Bahadur Singh* v. *Lucho Koer* (5) not been followed by the Calcutta High Court, as appears from the decisions in *Nundo Lall Bhuttacharjee* v. *Bidhoo Mookhy Debee* (6) and *Thakur Magundeo* v. *Thakur Mahadeo Singh* (7).

The right conclusion we think, on the language of s. 13 of the Civil Procedure Code (XIV of 1882) and the authorities, is that where the issue is not necessary for the decision of the suit, the decree couched in general terms does not cover the finding on that issue—nor indeed can such a finding by being expressly inserted in the decree acquire the force of *res judicata* which was wanting to it as part of the judgment of the Court. There is no section in the Code which makes it the more necessary to appeal from it, because it has been so inserted—Indeed the Code does not contemplate findings on issues being inserted in [603] it. See ss. 2 and 6, Civil Procedure Code, and the forms of decrees in fourth schedule.

(1) 2 I.A. 283. (2) 15 C. 756 (761). (3) 12 I.A. 23. (4) 6 C. 319.
(5) 11 C. 301. (6) 13 C. 17. (7) 18 C. 647 (651).

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Applying this view of the law to the present case, we have the defendant setting up two defences to the plaintiff's claim to have the house declared to be the property of his judgment-debtor Bai Jamna; 1st, that the house did not belong to Bai Jamna; 2nd, that it had been already sold to him by Bai Jamna and her son Mulji prior to the plaintiff's decree against Bai Jamna. The Court found that it was not Bai Jamna's property, but belonged to Mulji, and decided the suit on that finding; but it also recorded a finding on the 2nd issue, that the alleged sale to defendant was fraudulent and collusive. This finding was, therefore, not material in the sense of not being necessary for the determination of the suit, or, in other words, it was not covered by the general terms of the decree dismissing the plaintiff's suit.

We must, therefore, reverse the decree of the Court below and send back the case for a fresh decision having regard to the above remarks. Costs to abide the result.

Decree reversed.

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18 B. 603.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

NARAYAN DASAPPA (*Original Defendant No.* 3), *Appellant v.* ALI SAIBA AND OTHERS (*Original Plaintiff and Defendants Nos.* 1 *and* 2), *Respondents.** [2nd October, 1893.]

Landlord and tenant—Mulgeni *lease—Alienation by mulgenidar—Alienation contrary to the terms of the lease—Absence of any clause as to re-entry—Valid alienation—Suit by mulgar for possession.*

In the absence of any clause of re-entry in the event of alienation by the mulgenidar (permanent tenant) contrary to the terms of the lease, the mulgar (landlord) cannot treat the alienation as void and recover possession from the alienee.

[F., 21 B. 195 (197); Cons., 26 M. 157 (161)=12 M.L.J. 189.]

SECOND appeal from the decision of Arthur H. Unwin, District Judge of Kanara.

[604] The plaintiff sued the defendant to recover possession of certain lands and arrears of rent. The plaintiff alleged that he had let the lands on *mulgeni* tenure to one Narna Kamti, who on the 12th June, 1873, passed a *kabulayat* to him agreeing to pay rent every year and undertaking not to alienate the lands and to surrender them to the plaintiff if he himself did not require them. The plaintiff stated that after Narna Kamti's death, defendants Nos. 1 and 2, who were his (Narna's) grandnephews and heirs, sold the lands to defendant No. 3 on the 3rd September, 1889, in violation of the terms of the *kabulayat*. He contended that the sale was void as against him, and had put an end to the *mulgeni* tenancy.

The first defendant pleaded that the stipulation in the *kabulayat* was penal and that plaintiff was not entitled to possession; that the *mulgeni* tenant right had been sold for a family debt to defendant No. 3, who was in possession of the lands and was liable to pay the arrears of rent.

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* Second Appeal No. 394 of 1892.